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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 563

A. C. CARSTENS, THOMAS A. LANDRETH, V. R. HYSLOP, H. H. HIGGINS and THE WASHINGTON WATER POWER COMPANY, a corporation,

Petitioners,

vs.

PUBLIC UTILITY DISTRICT No. 1 of LINCOLN COUNTY, a municipal corporation; JOHN LOME, a Commissioner thereof; LOUIS SCHULTZ, a Commissioner thereof; and A. H. REILLY, a Commissioner thereof,

Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR A WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Washington is not yet officially reported, but is found printed in 108 Wash. Dec. 90, 111 Pac. (2nd) 583.

JURISDICTION

The jurisdiction of this court is invoked under Title

28, U.S.C.A., Sec. 344 (b), the claim being that there has been drawn in question the validity of a Washington statute on the ground of its being repugnant to Section 1 of the Fourteenth Amendment to the federal Constitution.

Petitioners assert that the state court has decided a federal question. We dispute that the federal questions now presented were decided by the Supreme Court of the State of Washington after having been properly raised by petitioners. This matter will be discussed in the argument below.

STATEMENT OF THE CASE

The facts of the case are stated at length in the opinion of the Court below (R. 110-112). Briefly they are as follows:

The respondent Public Utility District No. 1 of Lincoln County (hereinafter called the District) is a municipal corporation organized and existing pursuant to Chapter I, Laws of 1931 of Washington, with boundaries coextensive with Lincoln County, Washington (R. 11-12), and with authority to construct and acquire, either by purchase or condemnation, and to operate and maintain plants or systems for the furnishing of electrical and water service. It is expressly authorized to exercise the above powers either within or

without its limits (Rem. Rev. Stat. of Washington, Sec. 11610 (d)), but not to issue any bonds or levy any taxes against property outside its limits (Rem. Rev. Stat. of Washington, Sec. 11610 (g)).

In December, 1939, (R. 11-15), the District instituted proceedings in eminent domain to acquire the electrical transmission and distribution properties of the petitioner Washington Water Power Company (hereinafter called the Power Company) located within the District (R. 16), together with a transmission line extending to a source of electrical supply in adjoining Grant County (R. 16) and certain ends of distribution lines extending from the District into adjoining Grant and Spokane Counties (R. 16-17).

The distribution properties which the District sought to acquire in Grant and Spokane Counties were but a small part of the total properties which it sought to acquire and were confined to those distribution lines which were served from substations within the District and which were adjacent and incidental thereto and operated as a part of and in conjunction therewith (R. 68-69), and which, if severed from the properties within the District, could not have been served by the Power Company without the construction of considerable additional electrical lines to connect the same with the existing system of the Power Company (R. 65-66).

In the eminent domain proceedings the District in due course made application for entry of a decree of public use and necessity. Prior to the hearing thereon the petitioners instituted this proceeding (R. 1-11) in the Superior Court of Lincoln County seeking an injunction to restrain the District and its Commissioners from acquiring any of the distribution properties of the Power Company located in either Grant or Spokane Counties.

Petitioners Carstens, Hyslop and Landreth are residents of Spokane County and customers of the Power Company served from the distribution properties aforesaid in Spokane County (R. 89-90), and petitioner Higgins is a resident of Grant County and a customer of the Power Company served from the distribution properties aforesaid in Grant County (R. 96). None of these individuals was sufficiently interested in the proceeding to do more than lend his name thereto. (R. 90-91, 96).

Pursuant to stipulation between counsel for the respective parties trial was had in the injunction proceedings at the same time and together with the hearing on the application for entry of a decree of public use and necessity in the eminent domain proceedings (R. 58).

At the conclusion of the trial the Trial Court took the matter under advisement and thereafter rendered its memorandum decision (R. 52) that the District was without power under Chapter I, Laws of 1931 of Washington, to acquire the distribution properties located in Grant and Spokane Counties, and subsequently a decree was entered in accordance therewith (R. 54). The District appealed to the Supreme Court of Washington from said decree (R. 56), and on such appeal the decision, for which a review is sought in this proceeding, was rendered reversing said decree (R. 110-123).

ARGUMENT

Summary

The individual petitioners are only nominal parties. The corporation petitioner is not an injured party with respect to its claim under the equal protection clause.

We will also contend that no federal question has been decided by the court below because only in their complaint in the trial court did petitioners make any reference to any federal question. They failed to raise the question in the appellate court, and the appellate court's opinion discussed no federal question. They failed to adequately present any federal question to this court.

We will contend that neither of the questions presented by petitioners are federal questions of substance because this court has already determined the applicable principles.

Jurisdiction

This court should not assume jurisdiction on the ground that the constitutional rights of the individual petitioners are involved, since these petitioners are merely nominal parties, and the party actually interested in pressing these claims is the corporation petitioner. See:

Smith v. Indiana, 191 U. S. 138, 24 Sup. Ct. 51, 48 L. Ed. 125.

The corporation petitioner has no standing in this court to challenge the state statute on the ground that, as construed by the court below, it denies equal protection of the laws, since the petitioner is not an injured party and only those injured may complain.

See the concurring opinion of Justice Brandeis in *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 347, 56 Sup. Ct. 466, 80 L. Ed. 688.

The federal questions which petitioners claim were raised below and decided were not adequately raised or presented, and were not decided:

(1) The allegations of the complaint concerning federal questions are too vague and uncertain. See:

Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 53 Sup. Ct. 32, 77 L. Ed. 180.

(2) The record fails to disclose that the questions were presented to the trial court.

(3) The record fails to disclose that the questions were presented to the state supreme court and there is nothing in the opinion rendered by that court to indicate that it considered any federal questions (R. 110). The state court rules discussed by petitioners relate only to the form in which questions may be presented and do not prevent a respondent before that court from clearly presenting in his counter-statement of questions every question, state or federal, which he considers to be involved (Rule XVI, subd. 4, Supreme Court of Washington, 193 Wash. 24-a, 25-a).

The failure of petitioners in this respect should, in itself, be deemed sufficient for denial of the writ. Federal claims may not be prosecuted piecemeal in the state and federal courts.

American Surety Co. v. Baldwin, 287 U. S. 156, 53 Sup. Ct. 98, 77 L. Ed. 231.

(4) A claim first made on petition for rehearing that a federal question is involved cannot serve as the basis of review in this court.

American Surety Co. v. Baldwin, 287 U. S. 156, 53 Sup. Ct. 98, 77 L. Ed. 231.

The petitioners in this case made some claim in their complaint that federal questions were involved, but did not raise this question again until after the decision in the Supreme Court of the state, and for this reason their claim should be disregarded and the rule stated above applied.

The federal questions which petitioners claim to be involved have not been adequately presented to this court.

Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 53 Sup. Ct. 32, 77 L. Ed. 180.

Questions Presented Not Federal Questions of Substance

There is no federal question "substantial in character" when decisions of this court have already established the principles applicable to the matter presented.

Zucht v. King, 260 U. S. 174, 43 Sup. Ct. 24, 67 L. Ed. 194.

No Violation of Due Process Because Condemned Property Taken Off Tax Rolls

The first question presented by petitioners is whether they will not be deprived of property without due process of law by a construction of Remington's Revised Statutes of Washington, Sec. 11610 (d), which

according to petitioners, "permits a public utility district to acquire by condemnation distribution lines and facilities for the distribution of electricity when the effect of such acquisition is to remove valuable property from the tax rolls of the counties in which petitioners live, the said counties being beyond the territorial limits of the public utility district which is permitted to acquire such property and by such acquisition require said property to become tax exempt".

Petitioners do not here specify of what property they have been deprived. In one place in their brief they state that the result of the condemnation of distribution lines by the public utility district, whose property is not subject to ad valorem taxation, will be to remove the property from the tax rolls and thus increase the tax burden of citizens of the area.

Such an increase of the tax burden of petitioners is not a deprivation of their property without due process of law. See:

> *Hunter v. Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. 40. 52 L. Ed. 151.

In another place in the argument in their brief petitioners base the claim that they as taxpayers and citizens are deprived of property without due process of law upon the statement that a county in which such outside distribution lines are located is deprived of

equal protection of law *or* deprived of property without due process of law when it can no longer levy ad valorem taxes on the condemned distribution lines. No such county is a party to this action. Nor did petitioners in their complaint in the trial court make any claim on behalf of such a county. Nor do they present to this court any question on behalf of a county.

If the county itself, rather than a mere taxpayer, were complaining, this court would hold that no substantial federal question was presented. See:

> *Oklahoma ex rel Phillips v. Guy F. Atkinson Co.*, 61 Sup. Ct. (Adv. Op.) 1050, 85 L. Ed. (Adv. Op.) 977.

While petitioners' assertion that they are being deprived of property without due process by the fact that the public utility district's eminent domain proceeding will result in taking property off the tax rolls is related by petitioners to the particular type of property located in the county in which they live, namely, distribution lines which are outside the territorial boundaries of the condemning public utility district, the circumstance that the properties they discuss are distribution lines and the circumstance that they are outside the territorial boundaries of the public utility district are purely adventitious when considered in relation to the constitutional claim being made. The

claim appears frivolous and utterly devoid of merit when it is considered that it could as well be made as to outside transmission lines and yet in the Supreme Court of Washington, as is stated in the opinion of that court, petitioners admitted the right of the public utility district to condemn transmission lines for bringing current to the distribution lines located within the territorial limits of the district (R. 111).

Denial of Equal Protection

The second question presented by petitioners is whether the construction of Remington's Revised Statutes of Washington, Sec. 11610 (d), permitting a public utility district to condemn distribution lines and facilities outside its territorial limits, deprives petitioners of equal protection of the law. Petitioners elaborate this point by the statement that the statute as construed "in effect" requires the residents of the territory served by such distribution lines and facilities "to receive their electrical service from a body which is not supervised by the Department of Public Service of the State of Washington as are private companies, or over which they cannot exercise any right of control by the ballot box as can the citizens who live within the territorial limits of the public utility district."

In the brief supporting the petition, petitioners make

it clear that there are two independent claims of denial of equal protection. One is that because he cannot vote at the election of public utility district commissioners, the outside customer is denied equal protection with the customer living within the territorial limits. The other is that because the public utility district is not regulated by the state department of public service, the outside customer is denied equal protection with customers of private companies which are so regulated.

That the claim that the right to vote at the election of the commissioners of the public utility district is guaranteed to a customer of the public utility district by the equal protection clause is not substantial in character is indicated by the holding in *Soliah v. Heskin*, 222 U. S. 522, 32 Sup. Ct. 103, 56 L. Ed. 294.

The difference in the matter of the right to vote between citizens within and citizens without the public utility district is paralleled by differences in obligations and burdens. The district cannot issue any bonds or levy any taxes against property outside the district. (Rem. Rev. Stat. of Washington, Sec. 11610 (g)).

As to the claim that lack of regulation of the public utility district denies its customers equal protection with the customers of private companies, see:

Springfield Gas & Electric Co. v. Springfield, 257 U. S. 66, 42 Sup. Ct. 24, 66 L. Ed. 131.

It has not been proved, and this court will not assume that the rates charged by the public utility district will be any higher than the rates charged by a privately owned utility whose rates are controlled by the state public service commission.

CONCLUSION

This case involves the right of a municipal corporation to take distribution lines lying outside of its territorial limits but incidental and adjacent to properties being taken which are located within the territorial limits. This is a right which has been frequently exercised by such bodies. Petitioners' attack upon it in this case is wholly without merit. The petition should be denied.

Respectfully submitted,

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